

No. 16097 ✓

United States
Court of Appeals
for the Ninth Circuit

ROBERT E. AUSTIN and MARIAN H.
AUSTIN, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax
Court of the United States

FILED

OCT -1 1958

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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The Tax Court of the United States

Docket No. 57111

ROBERT E. AUSTIN and MARIAN H.
AUSTIN, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency Ap:LA:AA:KD-HT 90D:VFC dated December 31, 1954, and as a basis of their proceeding allege as follows:

1. The petitioners are individuals, husband and wife, with residence at 500 Poinsettia Avenue, Manhattan Beach, California. The returns for the period here involved were filed with the Collector for the Los Angeles District of California.
2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioners on December 31, 1954.
3. The deficiencies as determined by the Commissioner are in income taxes for the calendar years 1950, 1951 and 1952, in the amount of \$2,503.30, all of which is in dispute.
4. The determination of tax set forth in the said

notice of deficiency is based upon the following errors:

(a) Profits arising from sale of real estate owned and held by petitioners as investments were classified as regular income whereas they should have been classified as long term capital gains.

(b) Determined that one of us (which one is not indicated) is subject to self-employment tax as provided by Section 481 of the 1939 Internal Revenue Code for the years 1951 and 1952.

5. The facts upon which the petitioners rely as the basis of this proceeding are as follows: Petitioners at various times acquired the real estate, sales of which are involved in this matter, as investments and held said real estate as investments with the hope that values and prices would rise. The property sold was held by petitioners for from two to seven years. All sales were made to persons who sought out petitioners and made unsolicited offers to purchase without any sales activity on the part of petitioners. None of said property was held for sale to customers, nor for sale in the course of taxpayers' trade or business. Neither of the petitioners is or ever was engaged in buying and selling real estate as a trade or business, and none of said real estate was sold in the regular course of petitioners' trade or business. The business or occupation of petitioner Robert E. Austin is and at all times involved herein was that of attorney at law, and he was during the years involved herein at no time engaged in any other business. That petitioner

Marian H. Austin at all times concerned herein is and was a housewife, and was not in anywise engaged in the business of buying and selling real estate, or any other business except that of being a housewife.

Wherefore, the petitioners pray that this Court may hear the proceeding and determine that the Commissioner's findings, as set out in his notice, a copy of which is attached hereto and marked Exhibit A, are incorrect, and that no deficiencies whatsoever are due from petitioners in the matters covered by said letter.

/s/ ROBERT E. AUSTIN,
/s/ MARIAN H. AUSTIN.

Duly Verified.

EXHIBIT "A"

Form 1230 (App.)

U. S. Treasury Department
Internal Revenue Service
Regional Commissioner
1250 Subway Terminal Building
417 South Hill Street
Los Angeles 13, California

Dec. 31, 1954

In replying refer to
Ap:LA:AA:KD-HT
90D:VFC

Mr. Robert E. Austin and
Mrs. Marian H. Austin
Husband and Wife
500 Poinsettia Avenue
Manhattan Beach, California

Dear Mr. and Mrs. Austin:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1950, December 31, 1951, and December 31, 1952, discloses a deficiency or deficiencies of \$2,502.30, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not ex-

Exhibit "A"—(Continued)

clude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, 1250 Subway Terminal Building, Los Angeles 13, Calif. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earlier.

Very truly yours,

T. COLEMAN ANDREWS,
Commissioner,
By H. L. DUCKER,
Acting Associate Chief, Appellate.

Enclosures: Statement, Form 1276, Agreement Form.

Ap:LA:AA:KD-HT

90D:VFC

STATEMENT

Mr. Robert E. Austin and Mrs. Marian H. Austin, Husband and Wife, 500 Poinsettia Avenue, Manhattan Beach, California.

Exhibit "A"—(Continued)

Tax Liabilities for the Taxable Years Ended
 December 31, 1950
 December 31, 1951
 December 31, 1952

Income Tax	Deficiency
1950	\$ 395.96
1951	429.46
1952	1,676.88
 Total	 <u>\$2,502.30</u>

In making this determination of your income tax liabilities, careful consideration has been given to the report of examination, a copy of which was forwarded to you on September 10, 1954, to your protest dated October 5, 1954, and to the statements made at a conference held on November 10, 1954.

It has been determined that you realized ordinary income of \$7,782.56 in 1950, \$10,476.79 in 1951, and \$9,308.59 in 1952, from the sales of unimproved real estate instead of long-term capital gains as reported in your returns. Accordingly, the net income reported has been increased by those amounts and decreased by the amounts of the taxable portion of the long-term capital net gains reported thereon for the respective taxable years.

It has been determined that you are subject to self-employment tax as provided by section 481 of the 1939 Internal Revenue Code for the years 1951 and 1952.

Taxable Year Ended December 31, 1950		
Adjustments to Net Income		
Net income as disclosed by return		\$1,499.30
Additional income:		
(a) Ordinary income	\$7,782.56	
Reduction in income:		
(b) Capital gain	4,006.24	3,776.32
 Net income adjusted		 <u>\$5,275.62</u>

Exhibit "A"—(Continued)

Explanation of Adjustments

- (a) This adjustment has been previously explained herein.
 (b) The adjustment to gain from sale of capital assets is shown below:

Net capital gain reported which is included in profit from real estate sales reflected in item (a) above	\$3,006.24
Capital loss carry-over from 1949	\$4,347.85
Less: Capital loss limitation for the taxable year	1,000.00

Capital loss carry-over to 1951	\$3,347.85
Adjustment	\$4,006.24

Computation of Tax

Net income adjusted	\$5,275.62
Less: Exemptions (5)	3,000.00

Amount subject to tax	\$2,275.62
Joint return (one-half)	\$1,137.81
Tentative tax	227.56
Less: 13%	29.58

Total tax	\$ 197.98
Joint return (multiplied by 2)	\$ 395.96
Correct income tax liability	\$ 395.96
Income tax liability as disclosed by return, Acct. No. 3213191	None

Deficiency of income tax	\$ 395.96

Taxable Year Ended December 31, 1951

Adjustments to Net Income

Net income as disclosed by return	\$13,073.41
Additional income:	
(a) Ordinary income	\$10,312.16
Reduction in income:	
(b) Capital gain	\$8,021.57
(c) Taxes	1,000.00

Net income adjusted	\$14,364.00

Exhibit "A"—(Continued)

Explanation of Adjustments

(a) This adjustment has been previously explained herein.

(b) The adjustment to gain from sale of capital assets is shown below:

Net capital gain reported \$ 9,499.36

Net capital gain adjusted from sale of
laundry:

Selling price \$9,000.00

Cost \$13,806.82

Less depreciation:

Per return\$9,057.92

Additional

1951 164.63 9,222.55

Adjusted basis 4,584.27

\$4,415.73

Less expense of sale 936.50

Recognized gain \$3,479.23

Long-term capital gain (50 percent) ... \$1,739.62

Add: Joint venture long-term

capital gain 3,086.02

Total long-term capital gain \$4,825.64

Less: Capital loss carry-over

from 1950 3,347.85

Corrected net capital gain 1,477.79

Adjustment \$ 8,021.57

(c) Your deduction for taxes paid on real and personal property in Los Angeles County has been increased in the amount of \$1,000.00 in accordance with your amended return.

Exhibit "A"—(Continued)

Computation of Tax

Net income adjusted	\$14,364.00
Less: Exemptions (5)	3,000.00
Amount subject to tax	\$11,364.00
Joint return (one-half)	\$ 5,682.00
Income tax on \$5,682.00	\$ 1,310.14
Joint return (multiplied by 2)	\$ 2,620.28
Add: Self-employment Tax (21 1/4% of \$3,600.00)	81.00
Correct income tax liability	\$ 2,701.28
Income tax liability as disclosed by return, Acct. No. 261029106	2,271.82
Deficiency of income tax	\$ 429.46

Taxable Year Ended December 31, 1952

Adjustments to Net Income

Net income as disclosed by return	\$ 8,625.49
Additional income:	
(a) Ordinary income	\$9,308.59
(b) Taxes	426.72
Reduction in income:	
(c) Capital gain	3,872.00 5,863.31
Net income adjusted	\$14,488.80

Explanation of Adjustments

- (a) This adjustment has been previously explained herein.
- (b) Sales Taxes on the purchase of materials for construction of business property have been disallowed in the amount of \$426.72 for the reason that such taxes should be capitalized.
- (c) The adjustment to gain from sale of capital assets is shown below:

Long-term capital gains reported	\$ 5,101.25
Long-term capital gains corrected from sale of 4 acres on Rowell, Home Place	\$693.25
From joint venture	445.00 1,138.25
Adjustment	\$ 3,872.00

Exhibit "A"—(Continued)

Computation of Tax

Net income adjusted	\$14,488.80
Less: Exemptions (5)	3,000.00
Amount subject to tax	\$11,488.80
Joint return (one-half)	\$ 5,744.40
Income tax on \$5,744.40	\$ 1,441.88
Joint return (multiplied by 2)	\$ 2,883.76
Add: Self-employment tax (2 $\frac{1}{4}$ % of \$3,600.00)	81.00
Correct income tax liability	\$ 2,964.76
Income tax liability as disclosed by return, Acct. No. 263011925	1,287.88
Deficiency of income tax	\$ 1,676.88

Served March 29, 1955.

[Endorsed]: T.C.U.S. Filed March 25, 1955.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, R. P. Hertzog, Acting Chief Counsel, Internal Revenue Service, for answer to the petition of the above-named taxpayers, admits, denies and alleges as follows:

1. Admits that the returns for the period here involved were filed with the Director, or then Collector, of Internal Revenue for the Sixth Collection District of California, at Los Angeles; and admits the remaining allegations of paragraph 1 of the petition.

2. Admits the allegations in paragraphs 2 and 3 of the petition.

4. Denies the allegations of error contained in paragraph 4 of the petition and all subparagraphs thereof.

5. Denies the allegation contained in paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ R. P. HERTZOG, REM,
Acting Chief Counsel, Internal
Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel,
E. C. Crouter, Assistant Regional Counsel,
R. E. Maiden Jr., Special Assistant to Regional
Counsel, Godfrey L. Munter Jr., Attorney, In-
ternal Revenue Service.

[Endorsed]: T.C.U.S. Filed May 3, 1955.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is stipulated that the following facts may be received in evidence without further proof; provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts stipulated; and provided, further,

that both parties to this stipulation reserve the right to object to the materiality and relevancy of any of the facts herein stipulated.

1. The petitioners are individuals; are husband and wife, and reside at 500 Poinsettia Avenue, Manhattan Beach, California. The income tax returns for the period here involved, 1950, 1951 and 1952, were filed with the Collector, now Director, for the Los Angeles District of California. Photostatic copies of the returns are attached as joint exhibits 1-A, 2-B, 3-C and 4-D.

2. Petitioner, Robert E. Austin is a lawyer engaged in the private practice of law, and has been so engaged for the past forty years, having his law office in down town Los Angeles.

3. Petitioner, Marian H. Austin, at all times mentioned in this proceeding has been a housewife.

4. All lots and sales involved were in the Manhattan Beach area, except one.

5. The real estate purchases and sales by petitioner for the years 1943 to 1952, inclusive, are as follows:

Year	Purchases		Sales	
	Number of Transactions	Number of Lots	Number of Transactions	Number of Lots
1943	2	2	0	0
1944	2	5	0	0
1945	3	69½	0	0
1946	6	64½	24	38
1947	6	16	8	13
1948	3	9	22	26
1949	1	1	7	15
1950	1	1	5	11
1951	—	—	8	23
1952	—	—	10	14

During the years 1950, 1951 and 1952 petitioners received profits from twelve sales of prior years that were made on installment terms.

6. Petitioners' income from all sources for the years 1943 to 1952, inclusive, was as follows:

Gross Income 1943 to 1952, Inclusive, of Petitioners
Robert E. Austin and Marian H. Austin

Year	Rent	Number of Gross Amount			Net Profit		Gross Income	Net Collections From Law Practice
		Income from Interest	Law Practice Fee	Practice Fee	On Real Estate Sales	—		
1943	1,890.00	195.00	101	3,849.10	—	5,934.10	1,832.93	
1944	1,140.00	—	106	6,628.23	678.00	8,446.23	4,434.48	
1945	—	—	122	9,081.18	210.32	9,291.50	5,444.90	
1946	—	—	89	5,345.00	17,655.71	23,000.71	1,756.62	
1947	7,596.00	390.00	77	7,649.15	12,357.70	27,992.85	3,502.89	
1948	10,762.79	288.40	76	5,977.40	6,737.12	23,765.71	2,166.40	
1949	5,838.50	696.38	83	6,079.19	6,029.72	18,643.79	1,476.43	
1950	5,456.00	522.51	91	5,232.67	7,782.56	37,637.53	1,162.91	
1951	6,820.94	897.72	140	9,360.80	10,476.79	27,556.25	4,851.60	
1952	7,125.00	2,144.07	117	6,156.68	9,308.59	24,734.34	1,279.08	

7. The taxpayers for many years have been residents of the City of Manhattan Beach. Mr. Austin has been active in local affairs there for many years. He served as School Trustee, helped organize the local water district, participating in many elections relating thereto, and has been a member of the Board of Directors of the water district, and is presently the representative of that district on the Board of the Metropolitan Water District of Southern California.

8. The telephone at home is and always has been listed in Mrs. Austin's name. It is "Austin, Marian H., 500 Poinsettia Ave., Manhattan Beach." Mr. Austin's name has never been listed in the Manhattan Beach telephone directory.

9. Manhattan Beach is approximately 19 miles from downtown Los Angeles.

10. If it is determined that either or both are in the real estate business then the Commissioner has properly determined the self-employment tax as shown in the statutory notice of deficiency.

/s/ ROBERT E. AUSTIN,
Petitioner,
/s/ MARIAN H. AUSTIN,
Petitioner.

/s/ NELSON P. ROSE, REM,
Chief Counsel, Internal Revenue Service, Counsel
for Respondent.

[Endorsed]: T.C.U.S. Filed April 22, 1957.

Tax Court of the United States

Robert E. Austin and Marian H. Austin, Petitioners, vs. Commissioner of Internal Revenue, Respondent.

Docket No. 57111. Filed April 24, 1958.

Wendell H. Davis, Esq., and Robert E. Austin, Esq., pro se, for petitioners.

Gene F. Reardon, Esq., for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

Respondent determined deficiencies in petitioners' income tax for the years 1950, 1951 and 1952 in the respective amounts of \$395.96, \$429.46 and \$1,676.88.

At issue is whether lots which were the subject of certain sales were held by petitioners primarily for sale to customers in the ordinary course of their trade or business.

Findings of Fact

Some of the facts have been stipulated and are so found.

Robert E. Austin (hereinafter sometimes referred to as "Robert" or "petitioner") and Marian H. Austin are husband and wife. They filed joint returns for the years at issue with the then collector of internal revenue at Los Angeles, California. Since 1948 they have resided at 500 Poinsettia Avenue, Manhattan Beach, California. Marian H. Aus-

tin is a housewife and had little connection with the transactions set forth below. All lots and sales involved were in the Manhattan Beach area, except one.

Robert has practiced law since 1912, and at all times here relevant had his law office in downtown Los Angeles approximately 19 miles from Manhattan Beach. He first became the owner of real property in Manhattan Beach in 1918. This property was transferred to him in payment for legal services. Manhattan Beach was then primarily a resort area, and throughout the period 1918-1929 Robert owned either a cabin or a home there. In 1929 he established his residence in Manhattan Beach, and he has resided there continuously since that year. The population of Manhattan Beach in 1929 was approximately 5,000.

Since 1932 Robert has been active in the civic affairs of his community. He has been a member of the School Board. He helped to organize the local water district and has been a member of its Board of Directors. He represents his water district on the Board of Metropolitan Water District of Southern California.

The parties have stipulated the following real estate acquisitions by petitioners during the period 1943-1952:¹

¹ Some lots, in addition to the foregoing, were also acquired by petitioners during this period.

Year	No. of Transactions	No. of Lots
1943	2	2
1944	2	5
1945	3	69½
1946	6	64½
1947	6	16
1948	3	9
1949	1	1
1950	1	1
1951	0	—
1952	0	—

The lots acquired by petitioners in 1943 were purchased at an auction of tax delinquent properties. Robert and others, prior to the auction, asked the local tax collector to include certain lots among those scheduled for sale, and agreed to make opening bids on these lots. Robert bid on 30 or 40 lots at this auction. Robert purchased one lot for a friend who at the time of the bidding had used up his available funds.

Three of the lots acquired in 1944 were received in payment for Robert's legal services. Taxes were never paid by petitioners on this property and the lots were subsequently sold to meet the tax bill. Two other lots acquired in that year were located across the street from where petitioners were then residing, and were purchased to protect the character of the neighborhood.

One hundred and two of the lots acquired during 1945 and 1946 were sold to petitioners by the city of Manhattan Beach. The sales arose from the following circumstances: Certain property, located in Manhattan Beach (sometimes hereinafter refer-

red to as the city), was owned by the State of California and was not on the city's tax rolls. In order to list the property on the city's tax rolls it had to be privately owned, and the officials of the city were desirous of bringing about this result. Accordingly, a plan was devised whereby the city could acquire the property and then sell it to private parties. This plan entailed expenditures in amounts greater than the officials of the city were prepared to undertake. To aid in carrying out the plan Robert and three others agreed to pay the city any loss it might suffer as a result of this plan. In accordance with this agreement Robert purchased 102 lots which the city had acquired from the State and which it was unable to dispose of at public auction.

Petitioners acquired two lots in 1945 from a Mr. Friedman, one of Robert's clients.

Petitioners purchased nine lots from the Pacific Land and Title Company in 1945. These purchases were connected with Robert's membership in the Manhattan Beach Property Owners Association and that association's interest in acquiring a park.

Two of the lots acquired by petitioners in 1946 were located across the street from where they then resided, and were purchased to protect the character of the neighborhood.

Petitioners acquired 21 lots in 1946 from the Amaranth Land Company. These acquisitions came about in the following manner: A client of Robert's was involved in a joint venture concerning

real property. At the death of the client Robert was retained by the deceased's family to represent them in the disposition of the joint venture's property. In the course of winding up the joint venture, and while acting on behalf of the family, Robert entered the highest bid for the property. The family was interested in improving its cash position, and was disappointed in Robert's actions on their behalf. Robert paid the amount bid to the joint venture and the property was sold to him.

Petitioners purchased one lot in 1946 and four lots in 1947 which adjoined property already owned by them. The new acquisitions were to provide automobile parking facilities should future improvements on the original lots make such facilities necessary or appropriate.

Petitioners acquired two tracts of land, referred to as "lots" by the parties, in 1947 which totaled 125 acres. Part of this acquisition was received by Robert in payment for legal services.

Petitioners purchased six lots in 1947 for possible use as a site for a house. They built a house on these lots toward the end of 1948, and since that time it has been their home. Two other lots acquired by petitioners in 1947 were transferred to them by a couple who had earlier been given the property by petitioners with the understanding that they (the couple) pay for it whenever able. The uncertain financial position of the couple in 1947 resulted in the retransfer of the property.

Two lots purchased by petitioners in 1947 from a real estate broker were subsequently improved, and supply them with rental income.

Two additional lots were acquired in 1947 under the following circumstances: On one occasion in 1947 a client, Mr. Clendennin, came to Robert's office and discussed with him problems concerning certain lots owned by the client's daughter. Clendennin thought that his daughter would eventually lose money on these lots. He returned about one week later, told Robert that he had been advised that he (the client) did not have long to live, and asked Robert to purchase the daughter's property. Robert purchased two lots from the daughter; shortly thereafter the client died.

Four lots acquired in 1948 were purchased for residential purposes, and petitioners lived in the house thereon during 1948. They sold this property after moving into the house built on the six lots mentioned above.

Petitioners purchased three lots in 1948 from the Pacific Land and Title Company.

One lot was purchased in 1949 to make available additional parking and sewage facilities to a building, owned by petitioners, which housed a laundry.

Petitioners purchased one lot in 1950 from a neighbor who was unable to pay a debt to Robert. They paid for the lot, in part, by cancelling the indebtedness.

Petitioners made the following sales of real property:

Year	No. of Transactions	No. of Lots
1943	0	—
1944	0	—
1945	0	—
1946	24	38
1947	8	13
1948	22	26
1949	7	15
1950	5	11
1951	8	23
1952	10	14
1953	4	? ²
1954	1	?
1955	5	?

Payment for the sales was sometimes made in installments.

Petitioners acquired the lots sold in 1950, 1951 and 1952 in the following years:

Year Lot Acquired	Year Lot Sold		
	1950	1951	1952
1943	1		
1944			2
1945	4	1	4
1946	6	20	6
1947			1
1948		2	
1949			1

Petitioner made sales of real property in the following total amounts:

1950	\$ 7,750.00
1951	15,750.00
1952	21,584.32

² Question marks are used herein to indicate the absence of relevant evidence in the record.

Petitioners' gross income for the years 1943 through 1952 was composed of the following items:

Year	Rent from Interest	Income Law Fee	Number of Practice Collections	Gross Amount Law Practice Fee	Practice Collections	Net Collections From Law Practice	Profit on Real Estate Sales	Gross Income
1943	1,890.00	195.00	101	3,849.10	1,832.93			5,934.10
1944	1,140.00	—	106	6,628.23	4,434.48	678.00		8,446.23
1945	—	—	122	9,081.18	5,444.90		210.32	9,291.50
1946	—	—	89	5,345.00	1,756.62	17,655.71		23,000.71
1947	7,596.00	390.00	77	7,649.15	3,502.89	12,357.70		27,992.85
1948	10,762.79	288.40	76	5,977.40	2,166.40	6,737.12		23,765.71
1949	5,838.50	696.38	83	6,079.19	1,476.43	6,029.72		18,613.79
1950	5,456.00	522.51	91	5,232.67	1,162.91	7,782.56		37,637.53
1951	6,820.94	897.72	140	9,360.80	4,851.60	10,476.79		27,556.25
1952	7,125.00	2,144.07	117	6,156.68	1,279.03	9,308.59		24,734.34

The net profit on real estate sales shown above for the years 1950 through 1952 includes the profit

from installment payments received in those years on account of 12 sales made in prior years.

Petitioners' income from Robert's law practice and their real estate sales for 1953, 1954 and 1955 follows:

Year	Net Profit on Real Estate	Gross Amount Law Practice Fee Collections	Net Amount Law Practice Fee Collections
	Sales	?	?
1953	\$ 9,256.24	?	?
1954	16,675.56	\$7,567.00	\$2,825.00
1955	19,822.00	9,900.00	4,544.00

The net profit on real estate sales shown above for the years 1953 through 1955 includes installment payments received in those years on account of sales made in prior years.

Petitioners did not advertise in connection with their real property, nor did they post any "for sale" signs. They did not list their property with real estate brokers, and neither of them was a licensed real estate broker. They did not maintain an office in their home, and their home telephone number was listed under the name of Marian H. Austin.

Sales were initiated by prospective customers contacting petitioners through the mails or over the telephone. Negotiations were conducted in the same manner, and petitioners often did not come into personal contact with purchasers. On some occasions sales were initiated by brokers. On these occasions the brokers were acting for third parties.

Whenever necessary Robert would prepare legal documents in connection with a sale in his law

office. Prospective customers never came to his law office. Most of the sales involved were closed in escrow offices, not at petitioners' home.

Petitioners sometimes borrowed money from banks to help finance real property purchases.

There has been a large amount of real estate development in Manhattan Beach since 1945. People interested in purchasing property in Manhattan Beach went through the tax rolls to learn the names of property owners. Owners of property received numerous unsolicited inquiries concerning their property. Petitioners were aware of this situation.

The real property owned by petitioners was listed on the tax rolls under the names of Robert E. Austin and Marian H. Austin at their home address.

The lots sold by petitioners were held by them primarily for sale to customers in the ordinary course of trade or business.

Opinion

Raum, Judge: Was the real property sold by petitioners during the years in question held by them primarily for sale to customers in the ordinary course of their trade or business? That is the sole question herein. It is essentially one of fact. And, after re-examining the whole record, we have concluded that it should be answered in the affirmative.

In this connection the Court of Appeals for the Ninth Circuit in *Rollingwood Corp. v. Commissioner*, 190 F. 2d 263, said, at p. 266:

Most of the cases dealing with the problem

of whether property is held primarily for sale to customers in the ordinary course of trade or business involve situations where the taxpayer is engaged in some activity apart from his usual occupation and the question is whether this activity amounts to a business. The test normally applied in these situations is the frequency and continuity of the transactions claimed to result in a trade or business.

Applying these principles to the facts of the present case, there appears to be a more or less consistent activity in the sale of lots over a period of years, resulting in a steady flow of income. Taking into account the number of purchases, sales, the frequency and continuity of the transactions over the period involved, as well as other facts of record, we have concluded that the profits in question represented more than the fruits of the liquidation of casual investments but were such as to have had their source in the conduct of a real estate business.

Petitioners made a total of 94 sales during the period 1946 through 1955, 23 of which were made in the years 1950 through 1952. Over the longer period not less than 150 lots were sold, and a total of 48 were sold in the three years in issue. We are satisfied that petitioners were not engaged in isolated or casual selling transactions.

Petitioners' occupation with real estate matters is better appreciated when it is remembered that during the period 1943 through the years in question they acquired not less than 168 lots in 24 trans-

actions, and that two of these so-called lots totalled 125 acres. Additionally, petitioners' net profits from real estate sales were substantially in excess of the net collections from Robert's law practice in the three years before us and in most of the other years for which we have evidence. See *Mauldin v. Commissioner*, 195 F. 2d 714, 717 (C.A. 10), and *Estate of Luke J. Barrios*, 29 T.C.,—at p.—.

Robert testified that real estate transactions took up little of his time. But, as was pointed out in *Estate of Luke J. Barrios*, supra, at p.—, "all the time that was necessary to carry out the transactions was taken by petitioner. The fact that the lots were readily accessible for examination by prospective purchasers and that there was a seller's market enabled petitioner to make each sale with a minimum of time and effort on her part." Moreover, Robert did not include in his calculations the time that he spent in his law office drawing up sales contracts.

Petitioners rely on certain facts, significant in other cases, which aid them little in the circumstances of this case. That they did not advertise is of little importance. A seller's market made such activity unnecessary. *Estate of Luke J. Barrios*, supra; *Arthur E. Wood*, 25 T.C. 468; *J. Roland Brady*, 25 T.C. 682; *Shepherd v. United States*, 139 F. Supp. 508, affirmed per curiam, 231 F. 2d 445 (C.A. 6). For the same reason, their failure to improve the property in question is not significant.

Petitioners stress their intents and purposes at the time they acquired various properties, but the more significant question is for what purpose was the property held at the time of sale. *Rollingwood Corp. v. Commissioner*, *supra*; *Richards v. Commissioner*, 81 F. 2d 369 (C.A. 9); *Estate of Luke J. Barrios, supra*.

Moreover, even as to their intents and purposes at the time of acquisition, the record does not convince us of all that petitioners would have us believe. They would have us believe that many, if not most, of their acquisitions were motivated by altruism and civic and moral responsibilities. The evidence was not sufficient in some instances for us to make findings, and, in connection with other acquisitions, Robert's testimony is far from convincing.

Petitioners' frequent and continuing acquisitions and sales, their failure to indicate clearly more than a single transaction wherein they did not make a profit and their profits over a period of years persuade us that the testimony attempted to prove too much.

On the basis of the whole record we conclude, and have so found, that the real property sold by petitioners was held by them primarily for sale to customers in the ordinary course of their trade or business.

Decision will be entered for the respondent.

Served: April 24, 1958.

The Tax Court of the United States
Washington

Docket No. 57111

ROBERT E. AUSTIN and MARIAN H. AUSTIN,
Petitioners,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, filed April 24, 1958, it is

Ordered and Decided: That there are deficiencies in petitioners' income tax for the years 1950, 1951 and 1952 in the respective amounts of \$395.96, \$429.46 and \$1,676.88.

[Seal] /s/ ARNOLD RAUM,
Judge.

Entered: April 28, 1958.

Served: April 29, 1958.

[Title of Tax Court and Cause.]

PETITION FOR REVIEW

Petitioners, Robert E. Austin and Marian H. Austin, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that certain decision of the Tax Court of the United States in the above entitled matter entered on April 28th, 1958.

The decision appealed from is: That there are deficiencies in petitioners' income tax for the year 1950 in the amount of \$395.96, for the year 1951 in the amount of \$429.46, and in the year 1952 in the amount of \$1,676.88.

The controversy pertains to whether certain sales of real estate constituted sales of capital assets and consequently to be taxed at capital gain rates, or whether the sales were of property held for sale to customers in the ordinary course of a trade or business, so as to be excluded from the term "capital assets" as defined in Section 117 of the Internal Revenue Code of 1939.

Petitioners are and were during the years in question residents of Manhattan Beach, California. They filed income tax returns with the office of the Director at Los Angeles, California. The alleged deficiencies were assessed from the Los Angeles office. The trial before the Tax Court was had in Los Angeles. Manhattan Beach, California, and Los Angeles, California, are within the area of the United States Court of Appeals for the Ninth Circuit.

Dated: June 12th, 1958.

/s/ ROBERT E. AUSTIN,
/s/ WENDELL H. DAVIS,
Attorneys for Petitioners.

Notices of Filing Attached.

Affidavit of Service by Mail Attached.

[Endorsed]: T.C.U.S. Filed June 16, 1958.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 14, inclusive, constitute and are all of the original papers as called for by the "Designation of Record on Appeal" and "Designation of Additional Portion of Record on Review", including Joint Exhibits 1-A thru 4-D, attached to the Stipulation of Facts, and Joint Exhibit 5-E, admitted in evidence, in the case before the Tax Court of the United States docketed at the above number and in which the petitioners in the Tax Court have filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case as the same appear in the official docket in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 1st day of July, 1958.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, Tax Court of the
United States.

The Tax Court of the United States

Docket No. 57111

ROBERT E. AUSTIN and MARIAN H. AUSTIN,
Petitioners,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

TRANSCRIPT OF PROCEEDINGS

Court Room No. 10, Federal Building, April 22,
1957—11:10 a.m.

(Met pursuant to notice.)

Before: Honorable Arnold Raum, Judge.

Appearances: Wendell H. Davis and Robert E. Austin, 401 Bartlett Building, 215 West Seventh Street, Los Angeles, California, appearing for the Petitioners. Gene F. Reardon, 1135 Subway Terminal Building, Los Angeles, California, appearing for the Respondent. [1]*

Proceedings

The Clerk: Docket No. 57111, Robert E. Austin and Marian H. Austin.

Will counsel please state your appearances, please, for the record?

Mr. Davis: Wendell H. Davis, attorney, and Robert E. Austin, also an attorney; Mr. Austin is

* Page numbers appearing at top of page of Reporter's Transcript of Record.

one of the petitioners and is appearing in pro per, along with myself.

Mr. Reardon: Gene F. Reardon for the respondent.

The Court: Proceed.

Mr. Davis: A brief opening statement, your Honor.

Opening Statement On Behalf of the Petitioner
By Mr. Davis.

Mr. Davis: There is only one question before you to be decided in this case. That is, whether certain real estate acquisitions of sales constitute investments or whether the petitioners were in the real estate business, the difference, of course, being as to whether income is to be taxed at capital gain rates, 50 per cent taxable, or is to be regarded as ordinary income.

We contend that because, among other things, of the facts and circumstances surrounding the acquisition of the property, and the manner in which sales came about, that the transactions were investments.

I will not go into the evidence at this time. We [2] will simply state that there has been a stipulation as to some facts and that the petitioner, Robert Austin, will testify as to others.

The petitioner, Mr. Austin, has been engaged as an attorney at law for over 40 years, has practiced here in Los Angeles with his office down town in Los Angeles, and that has fully occupied his time.

The petitioner, Mrs. Austin, is a housewife. I believe the stipulation covers her.

Opening Statement On Behalf of the Respondent
By Mr. Reardon.

Mr. Reardon: In addition, your Honor, the respondent has determined that the petitioner is also liable for self-employment tax for two of the three years before the Court, and the parties have stipulated that if the Court finds the petitioner was in the real estate business, then he is subject to the self-employment tax.

The Court: What is the statutory issue?

Mr. Reardon: This is 117-A which, in defining capital assets for the purposes of becoming subject to the capital gains rate, exclude property held in the ordinary course of business, and the respondent's business is in this position, that this property was acquired and sold in the ordinary course of petitioner's business.

The Court: Your description is rather loose. [3] Are you referring to that clause in 117-A-1, which refers to property held by the taxpayer primarily for sales to customers in the ordinary course of his trade or business?

Mr. Reardon: Yes, your Honor.

The Court: Is that the clause that's involved here or is that some other clause in 117-A-1 that's pertinent?

Mr. Reardon: Yes, your Honor.

Further on in the statute where the capital assets are defined, and the exclusion clause is defined.

If it please the Court, I could read the pertinent section of the statute:

"The property held by the taxpayer, whether or not connected with his trade or business, but does not include"—and this is Subsection A—"property held by taxpayer primarily for sale to customers in the ordinary course of his trade or business."

The Court: Thank you. Do you wish to present the stipulation?

Mr. Reardon: Yes, your Honor.

Also, at this time, I would like to introduce Joint Exhibits 1-A through 4-D, which are the returns for the years involved, and we have had some difficulty with our Intelligence Unit in photographing them. They were rather busy and returned them to me this morning, and they weren't satisfactory. All [4] the pages are rather lengthy, so I'd like leave of the Court to submit these at this time and withdraw them at the conclusion of the trial, have them photostated, and return them to the Court within this week.

The Court: I don't want any photostats. I will receive the originals. You may withdraw them temporarily for the purpose of obtaining photostats for your own use, but I want the originals returned to the Court.

Mr. Reardon: Yes, your Honor.

(The document above-referred to were received in evidence and marked Joint Exhibits Nos. 1-A through 4-D.)

Mr. Reardon: In further explanation, your Honor, there are four returns involved for the three years, one being an amended return for 1951. There's no controversy over the amended return. In other words, it shows exactly the same thing that the original return does except for a mathematical mistake involving some taxes in issue that's not before the Court.

The Court: Proceed.

Whereupon,

ROBERT E. AUSTIN

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows: [5]

The Clerk: State your name and address, please.

The Witness: Robert E. Austin. My business address is 215 West Seventh Street in Los Angeles. My residence is 500 Poinsettia Avenue in Manhattan Beach, California.

Direct Examination

Q. (By Mr. Davis): You are one of the petitioners, Mr. Austin?

A. Yes, I am one of the petitioners, and my wife is the other. The returns here involved are the earnings and income of the family, myself and my wife, and in California terms, that is all community income.

Q. Will you explain the reason for the amended return in 1951?

A. Well, in making the original return, we made a miscalculation, as Mr. Reardon so stated, in fig-

(Testimony of Robert E. Austin.)

uring up the amount of taxes to be paid. The error in computing the amounts of taxes paid was discovered soon after figuring the original return, and we filed an amended return to correct it.

That doesn't involve any matter that will be in issue here, as far as I can tell, and will have no bearing upon the issues—the issue that is before the Court.

Q. With reference to this schedule of gross income, do you want to make one explanation in regard to the 1952—

The Court: Are you referring to the schedule in the stipulation of facts? [6]

Mr. Davis: Yes, it has been stipulated that any item should be explained in reference to the profit on real estate sales.

The Witness: The profit on real estate sales there was taken from some figures supplied by attorneys for the respondent, which we accepted them without checking them until just a few minutes ago I looked them over hurriedly just since I came into court this morning, and I think there is an error there, but you check with Mr. Reardon.

I am not quite sure with that in view of the fact that the variance of a thousand dollars one way or the other in the amount of profit on real estate sales wouldn't make any difference with the decision, I think that we can waive that.

Q. (By Mr. Davis): Well, was that in 1952? Do you refer to your home place?

A. In 1952, the real estate sales profits there

(Testimony of Robert E. Austin.)

includes an item of profit on the sale of a home in which I had lived.

Q. The Commissioner conceded that that was a legitimately classed profit as a capital gains profit, that the amount of the profit arising from the sale of that home was included in the total for 1952?

A. \$1386.50. Yes, that was a profit on the sale of part of the home place which is conceded to be legitimately a [7] capital asset.

Q. What is your occupation, Mr. Austin?

A. My occupation is a lawyer. I have been practicing law in Los Angeles—I was admitted to practice here in 1912, and have maintained an office, and have devoted my time and energy to the practice of law at all times since then.

Q. Your office has been at all times in Los Angeles? A. Yes.

Q. Do you devote any of your time to running other activities?

A. Well, in recent years I have been devoting a little time to some civic matters that I have become involved in, but they have no business significance, there is no income arising from them, though they do consume a substantial amount of my time.

Q. What is the nature of those activities?

A. Well, for several years I have been a member of the School Board. I assisted in the organization of some of the Water District in our area there, and have been a member of its Board of Directors for about ten years. I am also a member of the Board of Directors of the Metropolitan

(Testimony of Robert E. Austin.)

Water District, which is the water agency in this part of the country that brings water across from the Colorado River to Southern California, and in connection with that, I have had some assignments on various committees trying to work out some [8] of its problems.

Q. Your law practice, together with these other activities, they take up your full time?

A. They do. I am in the office part of every business day, and I maintain a regular schedule for the practice of law just the same now as I did 40 years ago.

Q. I am now going to show you a series of deeds, original deeds, to real estate, which have already been shown to counsel for the respondent, and I would like you to please tell the Court the facts and circumstances surrounding the acquisition of this property.

I believe counsel have agreed that these need not be introduced into evidence but they can be used as a convenient means of describing and talking about the various properties involved here.

I first show you nine deeds, all of them in the City of Manhattan Beach as grantors, to Robert E. Austin and Marian H. Austin, grantees, and they describe certain real property in the City of Manhattan Beach.

I ask you if you can recognize those deeds.

A. I do. These deeds and one other, I have been unable to find—these conveyed to me 102 lots by the City of Manhattan Beach. The conveyance was

(Testimony of Robert E. Austin.)

made in 1945 and '46. They arise out of a transaction in which some of my neighbors and I, in an effort to help the City of Manhattan Beach, held [9] on a tax roll quite a substantial amount of property to assist the City of Manhattan Beach to get on the tax roll a large number of lots in the city which were off the tax roll because they had been sold for taxes, and were then owned by the State of California.

We figured over several different methods at different times to get these properties back into private ownership, and that resulted in an agreement between myself and three or four others to guarantee the city against any loss it might incur if it proceeded under a law that had recently been enacted allowing municipalities to acquire title to tax deeds of land and use it for civic purposes, or sell it, or otherwise handle it.

The process of selecting the land and making the arrangements with the different governmental agencies having interest in them was an expense of \$3000.00 or \$4000.00, maybe \$5000.00, on the entire group. The city at that time was small, had a small assessed valuation, and the officials regarded that expenditure as being rather heavy unless they could be guaranteed against loss.

I joined three other parties in guaranteeing that the city would be able to sell the property or that we would pay the loss. That worked around during the year 1944 and '45, and finally it was determined by the city officials that they couldn't sell

(Testimony of Robert E. Austin.)

the property and wanted me and the others to [10] make good on our guarantee. This would have been somewhere about \$2000.00 or maybe \$2500.00 of a loss, so we finally determined that those others who had guaranteed the city against the expenses there would buy from the city at its cost.

The lots that were involved resulted in me being assigned the lots covered by these deeds, which I think is 102 lots. I paid the city for them.

Well there was one transaction by which this came about, the city deeded the lots to me a few at a time as it was able to get the consent of the other tax agencies for the release of particular lots, so that was the method by which I acquired that property. The city had held an auction sale or two on all this stuff a month or two before it was finally agreed that I would take this 100 lots. They sold some of them. In fact, I bid to encourage the sale.

The lots were not marketable then, and the price I paid for them, I think, was their full price, but I regarded it as being an investment that could be expected to pay off some time in the future.

Q. Well, these were all vacant lots, were they?

A. They were vacant lots.

Q. And you still own some of them?

A. Yes, I still have some of the lots that nobody wanted, yes. [11]

Q. During the time that you have held these lots, did you do anything in the way of advertising them for sale?

(Testimony of Robert E. Austin.)

A. No, I never did. All the sales that came about here originated by reason of somebody calling my house on the telephone and asking if we had such and such lots and if we would sell them. I think there were many calls that came in. My wife received the calls and told me about them. Sometimes we received postcard inquiries, and occasionally letter inquiries. I think I responded to those calls whenever they came and gave the inquirer a price on the lots. Sometimes we discussed the terms of the sale, whether it had to be cash, or whether I would take a contract for the lot or trust deed or something of that kind.

Q. Did you improve any of the lots?

A. No, I didn't improve any of the lots that had been sold; I improved some that I now have which are still on hand, but none that I sold.

Q. I next show you a deed from the Amaranth Land Company covering some 21 lots, Redondo Beach deeds, dated July 24, 1946. Do you recognize that?

A. Yes, I do. I acquired this from the Amaranth Land Company, and the circumstances of that acquisition were these: Mr. Hartranft had been my client for many years and—

The Court: What is the date of this transaction?

The Witness: This deed here, your Honor, is dated [12] the 24th day of July, 1946, and it involves 21 lots.

Mr. Hartranft had been a client of mine for

(Testimony of Robert E. Austin.)

many years, and when he died, he left several pieces of business unfinished, among them a joint venture, and in some real estate activities in Redondo Beach. Redondo Beach is two or three miles from Manhattan Beach where I live.

The family was short of funds and it was desired to liquidate this joint venture. There must have been four or five other people concerned in it, and none wanted these lots, but it was finally determined that the people who were interested in the joint venture would have a meeting around December, and would determine what to do with these lots.

The arrangement was that we'd sell them to the highest bidder in that group. I conferred with Mrs. Hartranft, and she wanted me to represent her, and I did.

We finally determined that she didn't want the lots, but that we didn't want somebody else to get them for nothing, so it was agreed that I should go there and bid the price of those 21 lots up to \$2400.00 in the hopes that somebody else would take them along. We thought the lots were worth more than that, but there wasn't any ready market for them.

I attended that meeting and we had quite a conference in which we disposed of some of the other business of the joint venture, and then we started to discuss the lots. We bid on them. I think the bid started off about \$1000.00. [13] I followed the bidding along until the bidding got to \$2400.00.

(Testimony of Robert E. Austin.)

I reported to her that we had bought them in at that price. She was much disappointed because she needed cash. She said she hadn't authorized me to bid \$2400.00. She wanted to boost the price so somebody else would buy it. I was so embarrassed by her attitude there and also by the fact that the other parties present would have a feeling that I hadn't been quite fair with them if I had reported making a mistake and didn't have the authority for the bid, so I proposed to Mrs. Hartranft I pay that \$2400.00 and take the lots. She didn't care who paid in the money, who got the lots, just so it wasn't her, and in accordance with that, I came along and paid this \$2400.00 there that I had to bid on the lots for Mrs. Hartranft, and they gave me this deed here which conveyed the title to myself and my wife.

That accounts for 123 of the lots listed in the stipulation.

Q. (By Mr. Davis): You mean the 21 together with the first group? A. Yes.

Q. Going back to that first group of lots for a minute, can you explain to the Court why the deeds bear different dates, the nine deeds? They range from August 16, 1945 to November 8, 1946.

A. Well, the city, in order to convey title, was [14] required to get a relinquishment from each of the other taxing agencies that had a tax lien against the lots. That included the School District and the County of Los Angeles, and the County Flood Control, and the Metropolitan Water Dis-

(Testimony of Robert E. Austin.)

trict, and they didn't release them all at once. They released apparently a few at a time.

Anyway, every little while, they notified me that they had a deed for me and delivered it, and I wrote the checks in that way, except that in the beginning I gave them a check, I think, for a hundred lots that they had, but they weren't able to deliver them all at that time, so they returned that check, and I gave them individual checks for each of the lots as they came through.

Q. Now, directing your attention to this second deed, FT-121, do you still own some of those lots?

A. Yes. Well, I still own a lot of lots I got from the City of Manhattan Beach.

Q. Now, the second group of lots there from the Amaranth Land Company, which you described in regard to Mr. Hartranft, do you own some of those lots?

A. Yes, I still own three or four of those lots.

Q. Those you have sold, did you advertise them for sale?

A. No, all those sales, like the others I have been telling you about, originated by reason of somebody making an inquiry. Those inquiries usually came into the home there [15] on the telephone.

The telephone is in my wife's name, and my wife's name is on the deed, and the inquirer would locate that address, and inquire at the Tax Collector's office to see who owned the lot.

Q. Did you list them with a real estate broker?

(Testimony of Robert E. Austin.)

A. No, I never listed any of these lots with any brokers.

Q. Did you ever put any signs up on them?

A. No, I never put up any signs.

Q. I will next show you—

The Court: Were any of the sales made through a broker?

The Witness: Why, yes, frequently I got a call—got a call from a broker. In fact, Mrs.—well, I don't know most of them, but a good many sales are on the telephone. A broker would call me on the telephone and ask me for price and terms and conditions of sale, and I always gave a broker the same kind of answer I gave to anybody else: I had the lots on hand, and if somebody wanted them, I'd be glad to turn my land into money, and so—

The Court: Well, the brokers knew they were for sale?

The Witness: Probably, in some cases, they did, but in the initial cases they all found that I was the owner by reason of contacting the Assessor's office. [16]

Mr. Reardon: This is hearsay testimony. I object.

The Witness: The original contacts were made through somebody sending a card to the house addressed to myself and my wife, or making a telephone call to the house. The phone is listed in her name, and her name is on the deed, so that I never listed any of the lots with any of them.

The broker who had made a purchase for them,

(Testimony of Robert E. Austin.)

a client in one case, sometimes knew that I had other properties, other lots, and some sales were made that way by him calling back for others.

Q. (By Mr. Davis): I next show you a group, R. E. and Elizabeth Crabtree, husband and wife, to Robert E. Austin and Marian H. Austin. These are dated July 31st, 1944, and describe certain acreage in San Bernardino County on two of the deeds. Riverside County is on the other deed.

Do you recognize those deeds?

A. Yes, I recognize them. I got these from Mrs. Nelson, whose name doesn't appear on it. She gave me this deed for a fee for some services, and I think the Crabtrees were nephew and niece of hers.

She had given me this deed of trust on a piece of land in Riverside County for a fee she owed me. She hadn't been able to pay it, and she sent her nephew and niece in to see me, and I accepted these deeds in payment of that debt. [17]

I later went out to look at the property. I thought it wasn't any good. I never paid any taxes on it, and after a while it was sold, for the taxes—so I got nothing from these although these deeds are part of the list that's given in the exhibit—in our exhibit here.

The Court: Will you identify them in relation to the stipulation?

The Witness: Paragraph 5 of the stipulation.

Mr. Reardon: May I interrupt, your Honor? In connection with that, respondent and petitioner

(Testimony of Robert E. Austin.)

had a joint exhibit they were going to introduce. It keynotes the lots by number, or these transactions.

The Court: They may be helpful. I am inquiring now in relation to the stipulation in fact.

The Witness: Well, these deeds were recorded August 10, 1944, and they describe—

The Court: Are they included in Paragraph 5 of the stipulation of facts?

The Witness: I think they are, if I can see that stipulation. Yes, they are.

The Court: Paragraph 5 details two transactions of purchase involving five lots.

Are those the deeds that you have been testifying about?

The Witness: Well, these three deeds here describe [18] three lots—three parcels.

The Court: Are those three of the five in Paragraph 5 of the stipulation?

The Witness: Yes, these are three of those five.

Mr. Davis: I think, at this time, we might introduce this schedule that shows the profits and sales during the three years in question here, 1950, 1951, and 1952. It also shows income from other lots that came in during these years. These other lots had been sold previously.

Altogether, there are 35, including the previous sales in the years before the three years here involved.

This schedule was prepared by somebody from the Internal Revenue Bureau originally.

(Testimony of Robert E. Austin.)

The Court: Are you bringing in a joint exhibit?

Mr. Reardon: Yes, this is the Department of Revenue's original calculation—the agent's original calculation of the transactions by the petitioner in the three years before—

The Court: It will be received.

The Clerk: No. 5-E.

(The document above-referred to was received in evidence and marked Joint Exhibit No. 5-E.)

Q. (By Mr. Davis): I next show you a deed from Adolph Riniker to Vera T. Greene, dated August 22, 1944, Lots 15 and 16, Block 21, of [19] Redondo Villa Tract, and a second deed dated July 24, 1946, from Ace S. and Gladys H. Conn to Vera F. Greene for Lot 13, Block 21, of Redondo Villa Tract B; a deed from Vera F. Greene to Robert E. Austin and Marian H. Austin, dated October 31, 1945, for Lots 15 and 16, and Lot 13; and deed from Vera F. Greene to Robert E. Austin and Marian H. Austin, dated July 25, 1946, for Lot 13 in Block 21 of Redondo Villa Tract B; and a deed from Frank H. Cole to Robert E. Austin and Marian H. Austin, Lot 14, Block 21, Redondo Villa Tract, dated July 19, 1946.

I ask if you can recognize this group of deeds.

A. I do. Our home at that time was on the west side of Rowell Avenue in Manhattan Beach. These lots immediately across the street from us were at that time vacant. They were lots 15 and 16, and 13 and 14, Block 21.

(Testimony of Robert E. Austin.)

The area wasn't very well built up at the time. There was considerable agricultural activity there, and my wife suggested to me that we ought to acquire the property immediately across the street so somebody wouldn't put in a stockyard there or something of that kind, and so I set about to acquire those lots, and this deed from Adolph Rini-ker, dated 1944, involving two lots is property that I acquired from him in an effort to protect our home in that way, that I took that property—that deed in the name of Vera F. Greene, who was then my secretary, so that it didn't expose the buyer, [20] that I was seeking to buy that for myself.

I called him on the telephone and wrote him some letters about it, and in the course of time, why, he sent me the deed to Vera F. Greene. That deed is dated the 22nd of August, 1944, and in October—October 31, 1945, she deeded those lots to myself and my wife. Now, I don't know whether this transaction appears on the list here as 1944—a transaction in 1944 or for 1945. It probably appears in '44, but I am not sure about that.

Now, these other two deeds here with Ace S. Conn on Lot 13. That was also one immediately across the street from us. I took that deed in the name of Vera F. Greene in the same way. I had contacted them to see if I couldn't buy the lots for the purpose of taking care of our home there, and that deed, through Vera F. Greene, was re-corded in '46. She deeded the property to me and my wife, and that deed was also recorded in '46,

(Testimony of Robert E. Austin.)

so that those two lots—or that lot appears as one of the transactions in '46.

Another one now that appears in '46 is the other one of those four lots which I bought from Frank H. Cole. That deed is recorded in July, 1946. That runs to myself and my wife, and had some business with Mrs. Cole—that's a woman, that name "Frank"—

Q. This property now has been sold or do you still own it? [21]

A. When we sold our home there on Rowell, we then sold this.

The Court: Are those sales included in the sales that were made during the years before the Court now?

Mr. Davis: No, I don't believe all of these—I might say that—I don't believe all of these sales were, but the stipulation there takes into account other years, and the respondents have seen fit to include in their schedules and offer of stipulation sales for other years and acquisitions, and so we have consented that we go along on that basis to give you a clear picture of the years in question.

The Witness: If I had before me that exhibit I could tell you whether these lots are included. I think these were made in 1951, either 1951 or '52.

Q. (By Mr. Davis): Well, how were these sales made?

A. Somebody called me up for a price on the property, and a discussion on terms was discussed,

(Testimony of Robert E. Austin.)

and then a little bit later the buyer who was a builder, whose name I think appears on that exhibit that you just brought in, and I completed that transaction with him.

That was done by telephone, writing, and I never did see him until after the sale was completed, and I met him over near the property where he was building some houses.

Q. I next show you a deed on Pacific Land and Title [22] Company, to Robert E. Austin and Marian H. Austin, dated March 24, 1945, and covering Lots 6 and 7, Block 2, Tract 142; and Lots 21 and 22, Block 5; and Lot 24, Block 37; and Lots 16, 17, 18, and 21, Block 64, Redondo Villa Tract B, and ask you if you recognize that deed.

A. I do.

Q. Can you explain about it?

A. That came about like this: I was a member of the community group there. They call it the Manhattan Beach Property Owners Association, in which they do little things around to improve the properties, and improve—get some streets, and so on, and they took up the acquiring a park near a place where they had a building, and I was appointed on that committee to see what we could do about that.

I discovered that the Pacific Land and Title Company owned Lots 21 and 22 in Block 5, which was a part of the area that we desired for the city to acquire for a park.

I contacted the manager of the business and

(Testimony of Robert E. Austin.)

proposed that he should give the lots to the city, but he wasn't ready to do that, and unless we did something for him, and so it worked out this way: He'd get the lots for the city if I'd buy the other three lots here. The price there is \$575.00. I thought the lots probably were not worth that, but I figured the city could pay for the lots 21 and 22, so I bought from him for \$575.00 the lots that you have just described. [23]

The Court: Are they—are these lots included in the 69½ lots?

The Witness: No, this is just a matter of eight lots, apparently. That is, in addition to this.

This wasn't acquired from the City of Manhattan Beach; this was acquired from a private owner.

The Court: In what year?

The Witness: In 1945.

The Court: This is not going to be very meaningful to me.

Your stipulation in effect sets forth three transactions in 1945 resulting in the acquisition of 69½ lots. Now, we have testimony about eight lots, and I don't know where they fit into this picture, and I suggest to counsel he try to button it up.

Mr. Davis: We will ultimately cover all of the lots there in the stipulation. We go through so many different transactions here.

The Court: Well, your answer is not helpful to me.

I point out to you again that the stipulation sets forth the acquisition of 69½ lots in three transac-

(Testimony of Robert E. Austin.)

tions. A fair reading of that tells me that those transactions constituted all of the transactions in which this petitioner acquired lots in 1945. Now, he is telling me about eight lots which he seems to suggest that they are not included [24] in these 69½ lots, and leaves the matter way up in the air.

Mr. Davis: Well, what we are trying to do is cover all of the acquisitions to give the Court a general picture for many years, beginning back—

The Court: Well, the burden is upon you. If you don't make it clear, you will have to take the consequences.

Mr. Davis: May I make a suggestion to the Court, your Honor, This Paragraph 5 was compiled by the respondent here and offered to us. I must admit that I didn't check it very carefully, but I thought that was about right. During the years when this was under discussion, we went over my books and records, everything, so that I had no doubt that their figures would be right in every respect. Now,—

The Court: Well, I call your attention to the fact that the purpose of the stipulation is to remove from trial matters that are agreed to, and when you file a stipulation with me, I assume that it contains the facts that the parties have agreed upon. I don't want to hear any testimony in contradiction of the stipulation.

Mr. Davis: Well, is that the purpose of this testimony?

(Testimony of Robert E. Austin.)

The Court: Well, I thought the witness was suggesting that the stipulation is not accurate.

Mr. Davis: Whatever acquisitions and sales there are, we want them before the Court with the facts and [25] circumstances of the acquisitions and the sales, and, of course, whether it was in one year or another wouldn't be too material, I don't believe. It's a matter of an over-all picture here of the three years.

The Court: It may be a matter of an over-all picture, but a picture I have got to understand before I decide this case, and you are presenting me with a fuzzy record.

Mr. Davis: Well, we will endeavor to clear it up, your Honor.

The Witness: May I volunteer, your Honor, the thinking in our mind and I think in the respondent's was that the question here is whether or not the type of activity constituted a business.

Now, that being the case, why, we didn't realize it would be vital or fatal if we made a mistake of a sale or two in one year or another. That is, the sale ought to be in one year, and happened to get, in this list, in another. We didn't figure that was important.

We also figured that these facts being presented by the Commissioner would undoubtedly be corrected. We don't think that what I have testified to here presents any variation of the facts that your Honor must know and consider to decide this case.

The Court: Proceed. [26]

(Testimony of Robert E. Austin.)

Q. (By Mr. Davis): I will show you three deeds from the North Angeles — strike that — two deeds from the North Angeles Land Company to Robert E. Austin and Marian H. Austin; one deed is dated April 10, 1947, and it is Lot 206 of the Western Empire Tract, and in the City of Los Angeles; and the second deed is from the North Angeles Land Company to Robert E. Austin and Marian H. Austin, Lot 303, Western Empire Tract, City of Los Angeles. That's dated April 10, 1947; and a deed from Ambrose Collette to Robert E. Austin, and Marian H. Austin, dated March 24, 1947, Lots 7, 8, 9, 22, 23, and 24, Block 23 of Tract 142.

I ask you if these relate to the same transactions—

A. North Angeles Land Company and conveyed to myself and my wife, title to the Lot 206, the Western Empire Tract, and a part of Lot 203 of the same. One of Mr. Hartranft's ventures, who I mentioned, and they were liquidating this corporation, and I thought that that property up there would probably be a good investment, so I bought from them as part of that liquidation, and also as a part of the payment of my fees 125 acres that is represented by these two deeds.

I intended to own that property for many years, and have just recently sold it. That was bought during the period covered by the list of purchases shown in Paragraph 5 of the stipulation here, but it was not sold during the period covered by our controversy here.

(Testimony of Robert E. Austin.)

The Court: It is reflected in Paragraph 5? [27]

The Witness: Yes, your Honor. That is part of the purchase.

The Court: For what year?

The Witness: 1947.

The Court: 1947 shows six transactions with the acquisition of 16 lots.

The Witness: Yes, your Honor.

The Court: And how many acres are involved here?

The Witness: Well, this is part of two different lots and 125 acres included all of this. This is up on the mountainside here in the northern part of Los Angeles.

The Court: Do you refer to a tract of that sort as a lot?

The Witness: Well, this isn't a tract, your Honor; this is some acreage, some 125 acres of land. The land, originally, your Honor, was surveyed here in this very large tract, and this Lot 206, I think, includes about 70 or 80 acres; Lot 203 was, as I recall, 60 acres.

This other deed that you have shown me is also involved in the purchase for 1947. My wife thought this would be a good place for a home, so we bought this property from the owner here in 1947, built a house on it. We are living there now. That's part of the home place. There are six lots in this purchase. These are small.

As far as acreage, these lots are 25-foot lots and [28] six of them make a satisfactory building site.

(Testimony of Robert E. Austin.)

Q. (By Mr. Davis): You presently reside there?

A. Yes, that's my home where I now live.

Q. I next show you a deed from Robert J. Tracy and Dorothy G. Tracy, dated April 28, 1948, and pertaining to Lots 5, 6, 16, and 17 in Tract No. 2143.

I ask you if you recognize that deed.

A. Yes, I recognize this. This was recorded in April, 1948. It describes four lots and is part of the property described in Paragraph 5 of the stipulation.

About the time we had sold our home on Rowell Avenue, we hadn't yet decided to build on the Collette lots, and so we bought this lot from Tracy which had a house on it, and we moved in there, and that was our home for a considerable period after that. I think later that year we built on the lots that are at the present address, 500 Poinsettia, and we sold the Tracy property after we moved in there.

Q. Did you make a profit on that transaction?

A. I am not sure. I rather think that we sustained a small loss there, but I am not quite sure about that. Anyway, that was just moving into one home from another.

Q. I next show you a deed from Gordon W. Hosking and Marie Hosking, husband and wife, dated March 31, 1947, and covering Lots 1 and 2 in Block 53 of Redondo Villa Tract B. [29]

A. Marie Hosking had lived with us for several

(Testimony of Robert E. Austin.)
years before she married. She was growing up with us, and married a young man in 1946.

I had helped them buy a home, and done several little things to help them get along. Somebody came along and offered to sell to me two lots, these two lots here, in a part of town that was near where they were living. I thought it would be nice if they had a little real estate so they could feel they were a substantial part of the community.

The house that they were living in, I had bought that, it was in my name, and so they were living in it, and so I thought this would be a good thing, and I bought these two lots, and put them in their name and expected them to pay for it whenever they got around to it.

After a while Gordon lost his job, and they deeded the lots back to me in 1947, and I presume that is one of the sales that appears in this Exhibit 5, but I am not quite sure whether that was the year that I bought it for the Hoskings or whether the date they deeded it to me. In any event, that's the facts relating to the acquisition of that property.

Q. What became of that property?

A. Well, later on a real estate dealer, whom I have come to know pretty well, called me up to inquire whether or not I owned those lots, and whether they were for sale. I told him they were and gave them a price on it, and I sold them [30] almost immediately for the price I quoted.

Q. Did you ever advertise the property for sale?

(Testimony of Robert E. Austin.)

A. No, I didn't advertise this, or any other of the properties I have owned. I let it take care of itself the best it could.

Q. I show you a deed from William R. and Adella Unfug, dated October 18, 1946 on Lot 21, Block 2 of Tract 142; and a deed from Charles Terry to Vera F. Greene, dated February 28, 1947, Lots 19 and 20, Block 2, Tract 142; and a deed from Vera F. Greene to Robert E. Austin, and Marian H. Austin, dated April 1, 1947, covering that same two lots as mentioned in the last deed.

Do you recognize those?

A. Yes, at that time I owned Lots 6 and 7 in the same block. These three lots were immediately behind it. Lots 6 and 7 were facing on Manhattan Beach Boulevard, and I thought they had considerable potential there for business uses, and that in order to make good use of that property, it needed some parking space, and so one of my neighbors was a real estate man, and one day came in and asked me why I didn't buy the lots, so I told him I would be glad to do so at a reasonable price. He reported back a day or two later that he could get that lot for whatever it was, and he thought that he could get the two adjacent. I told him I'd be glad to buy all three of them for a satisfactory price to make a parking area for the [31] Lots 6 and 7 for any business that might be established there.

Somewhere along the line about the time of these deeds are dated, why, he came in and with the nec-

(Testimony of Robert E. Austin.)

essary arrangements, and I bought from William Unfug Lot 21. That deed is recorded in November, 1946, and I think that it's one of the purchases required that's listed here. And the other lot was purchased—I purchased that in the name of Vera Freene. I didn't pay the full amount of the purchase price there, and so I took it in her name. She executed the trust deed for the balance of the purchase price, and I paid it off later on. She deeded the two lots to me. Those are the Lots 19 and 20 in Tract 142, which backs up Lots 6 and 7 that I have just mentioned. Those lots, I continued to own them until here about a year ago. At that time my wife was interested in one of the churches there and we gave Lots 6 and 7 to the church, and we sold them I guess you'd say, the other three lots which we thought they would need for parking, the rest of the church yard, so that was sold and disposed of in that way.

Q. I show you a deed from Fred H. Kochsmeier and Alvina Kochsmeier to Robert E. Austin, dated March 12, 1947, pertaining to Lots 17 and 18, Block 60 of Tract 1638.

A. I owned Lots 13 and 14. That's part of what I got from the City of Manhattan Beach in this same block, and Lots 17 and 18 back up to them, so that it gave an entrance to those [32] lots from a side street, and also furnished a little bit of parking space, and this same broker who sold me the lots I have just mentioned in Tract 142 came in and offered to sell me these lots after I bought them

(Testimony of Robert E. Austin.)

from him to fill out or build up the site we had there on the north side of Manhattan Beach Boulevard so to give them a street access from side streets and also for a little parking space.

I bought that in 1947, and then I think, that, is one of the deals that's described in 1947, two of the lots there.

Q. What disposition was made of that property?

A. Here about a year ago I sold the four lots to a broker there who has since improved it.

Q. Did he contact you about the sale, or did you—

A. Yes, he had an office close by and came over to my house one evening to see me about that, to see if I would sell it. I gave him a price on it. We talked about it a little. He said he would take it if I would give him a little time. He wanted a day or two. A day or two later, we signed up some papers in escrow somewhere, and the deal was completed in that way.

Q. He bought it for himself? A. Yes.

Q. I show you a deed from a Frank Perry and Marian F. Perry to Vera Freene, dated March 12, 1947, Lots 34 and 35, of Block 109, Redondo Villa Tract B; and a deed from Vera F. [33] Greene to Robert Austin and Marian H. Austin for the same lots, dated May 26, 1947.

Do you recognize those deeds?

A. I do. The real estate broker down there came in to see me to see if he couldn't sell me those lots. He gave me a good talk and I thought it was a good

(Testimony of Robert E. Austin.)

investment, so I took them in the name of Vera F. Greene because, in fact, the seller was a lawyer whom I knew very well and I wasn't ready to pay the full amount in cash, so I took it in the name of my secretary, who executed the trust deed for it, the unpaid balance of the purchase price.

The other deed now, she executed. That was paid off and cleared up.

This purchase was made in March, 1947 and deeded to me along in June, 1947. I still have those lots. I put a building on them, and that's been a fairly good investment.

Q. You hold them today as income property?

A. Yes.

Q. I show you a deed from H. L. Byram, a tax collector of Los Angeles, to L. Kathleen Smale, dated August 15, 1947, Southwest 50 feet of Lot 10, Tract No. 1272; and a second deed from H. L. Byram to L. Kathleen Smale, Lot 7, Block 11, Tract 1638. That's dated August 15, 1947.

I will ask you if you recognize those deeds.

A. I do. Mr. Clendennin had been a client of mine for [34] many years. He came into my office and told me his daughter had bought some titles and that he was afraid she was going to lose some money on it, and he wanted to know if I couldn't help her out. I discussed the matter with him a little, and told him that I thought he probably could clear up the titles and get out all right.

About a week later he came in and said he had just been to a doctor and the doctor said that he

(Testimony of Robert E. Austin.)

had been troubled with a heart condition for quite a little while. The doctor told him he was in bad shape and that he might just drop off any time.

He didn't want to leave Kathleen with a deal of this kind on hand, and he wished that I would take it over so as to relieve him of that worry. We talked around a little, and I finally told him I would give him \$500.00 for it, which I did. Kathleen gave me a deed for it. Mr. Clendennin died in about 30 days.

I went out to look at the property and I didn't think it was a very good investment. One of the lots involved was taken on a street improvement bond; the other one had a bond against it, and quite a little other taxes that weren't included in the county deed. I determined that that was valueless, and decided to abandon it.

But, about a year or a year and a half later, somebody called me on the telephone and made an offer there [35] that I thought was pretty good, so I checked on that, so I found that I could clear up the title to the property for about \$1100.00. They were willing to give me about \$2000.00 for it, so I got the title cleared up by paying off the bond and other tax liens, and sold it there for about \$2000.00. I don't know who the buyer was, but I remember they called me on the telephone and that consummated that deal in escrow somewhere. The papers were signed by myself and my wife and mailed out, and I never did see the buyer.

Q. Where are deeds from this Smale to you and your wife?

(Testimony of Robert E. Austin.)

A. Well, I don't know, if you don't have them. I presume they are mislaid some place, and anyway I don't remember where they are.

Q. I next show you a deed from George H. Jones and Nelvina Jones to Robert E. Austin and Marian H. Austin, dated January 15, 1949, for Lot 12, Block 58.

A. Yes, I recognize this. Had built a building on the corner diagonally across the street from this, operating a laundry there.

We needed a little more space for some cesspools to take care of it, and we needed some parking, so I bought this lot from Mr. Jones. I happened to know him.

I went over to him and bought the lot from him and had it for the laundry for refuse disposal and for parking. We used that lot in connection with that building as long as [36] I owned it. That building was sold here about a year ago. Somebody sold this lot along with it. The sale of the building and lot was made through a broker who came by wanting to know if he could sell it for me.

Q. I show you a deed from Homer E. Deaver to Robert Austin and Marian Austin, dated November 21, 1950, for Lot 14 in Block 22, Redondo Villa Tract B.

A. Oh, Mr. Deaver was a friend of mine and a neighbor. This lot was directly across the street from where I lived on Rowell Avenue for quite a while.

I loaned him some money and took a deed of trust

(Testimony of Robert E. Austin.)

on this property. After a while, he got in bad circumstances, and he wanted to give me the property in lieu of paying the debt. I think we worked out some kind of deal. I paid him some money. I forgot just what now, but anyway in 1950, he gave me a deed to the lot and this is one of the transactions, I guess the only transaction—big transaction that occurred on this schedule in 1950.

So, I bought that later on. I sold that to a builder who had looked over the books and came to my house one night and said he would like to buy it. He described the lots he'd like to have, and I sold him this along with some other five or six others in one transaction there, perhaps along in '52 or—I don't remember the date. If I had this Schedule 6, I could tell which deal that was. [37]

Q. I show you three deeds all pertaining to Lots 12 and 13, Block 37, Redondo Villa Tract B, one from Jeanette Harris to V. F. Greene, August 31, 1945; one from Joseph Brown and Fanny V. Brown to V. F. Greene, dated August 28, 1945; one from Naomi Newman, dated September 11, 1945.

I ask you if you can recognize these deeds.

A. Yes, I had a client, Mr. Friedman, who acquired these lots, and they were deeded to Vera Greene, my secretary, for his convenience. I had some business with him, and he turned over these lots to me in working out some of our settlements, perhaps fees, or some other investments we may have had. And these were also sold also as a part of a deal with a builder. I don't remember who it was

(Testimony of Robert E. Austin.)

or how I got in touch with him right now, but anyway I sold them. I never made any effort to sell any of these lots except to respond as the inquiry came about.

Q. I show you a deed from the Pacific Land and Title Company to Robert E. Austin, dated May 22, 1948 for S, 9, and 10, Redondo Villa Tract—

A. I think that Mr. Morrow, the owner of this business, called me on the phone and stated that he had these three lots on hand and was willing to sell them awfully cheap and he wondered if he couldn't interest me in them. He told me where the lots were, and what the price was, and I agreed to buy them. [38]

Q. Did you have a client by the name of Randall? A. Yes, I have.

Q. Did he have anything to do with these?

A. Well, no, I don't think so. There are some other deeds there. I think Mr. Randall represented him in some matters, but my best recollection is that I bought these direct from Morrow there on an offer that I thought was pretty good.

Q. I show you two deeds from H. L. Byram, Tax Collector of Los Angeles County, one to Robert E. Austin, dated November 22, 1943, Lots 18 and 19, Block 64; and the second the 22nd day of November, 1943 also, and it's from the same party to the same party, Lot 40, Block 180.

A. This Lot 18 was part of a tax delinquent in Manhattan Beach they were trying to get on the market. We had agreed that several of us would go

(Testimony of Robert E. Austin.)

to the Tax Collector and ask him to put lots on the scheduled sale that was coming along and we had agreed that each of us would put—the Tax Collector wouldn't put on the sale unless somebody agreed to be there to make an opening bid on them, and so part of that—as part of that deal, I went up and asked them to put a schedule of sale there on ten lots. We agreed to be there at the sale to make an opening bid on each of them.

I bid on them, but somebody else took bids up, so the only one I got out of it was Lot 18, Block 64. That was [39] in 1943, and I continued to own that until somewhere along in, I think, 1952 or 1953 when I sold that. That lot was, I thought, almost worthless, but I did my duty to the city and carried out my agreement there. In fact, right along that line, why, I did that same thing on two or three other sales and I suppose maybe it was a means of selling them, 30 or maybe 40 of those lots, but I didn't have to buy any of them except that one.

At that same sale, at the time that same sale took place, a client of one of my associates was there bidding against the property. He told me that he had run out of money and asked me if I wouldn't bid on Lot 40, Block 180. At his request, I bid on that lot at that sale. He didn't reimburse me the next day, but some time later he gave me back \$14.50, which was half of the purchase price, and he said that we'd own the lot together, and he'd find a market for it and make me a little profit.

He never did sell it, and so about five years later,

(Testimony of Robert E. Austin.)

he came to me and told me it was up for sale for taxes and he gave me \$10.00 for a deed to it. I gave him a deed for \$10.00, and haven't had word of it since. So, that's the disposition of that lot.

The Court: I am going to recess. We will reconvene at 2:00 o'clock.

(Whereupon, at 12:30 p.m., a recess was taken until 2:00 p.m. of the same day.) [40]

Afternoon Session, 2:00 p.m.

Whereupon,

ROBERT E. AUSTIN

called as a witness for and on behalf of the Petitioners, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Davis): Mr. Austin, are there any other deeds pertaining to the property included in the stipulation covering the 14-year period back to 1943 that have not been presented here?

A. Well, I don't know whether there are or not. It seems there's another deed or two, but I didn't realize that would be a material fact here, so I didn't make a careful search for them before I came. My impression was that the mode of operation would be the subject of inquiry here.

Q. Whatever other property there might be included in the stipulation was acquired in a similar manner?

A. Yes, along through the years, every once in a

(Testimony of Robert E. Austin.)

while, I have acquired a piece of a property by a fee or something of that kind. Once in a while, maybe I perhaps bought something I thought was a good buy, but I don't recall any of those that aren't included in the list here.

Q. What percentage of time did real estate acquisitions [41] and sales take in comparison with your law practice?

A. Oh, I'd say that it was infinitesimal, probably less than one percent of my time on this. Ordinarily, the sales were made—the purchases were made ordinarily by somebody sending a card to the house or calling in there on the phone. I responded by phone, or put a price on a card. That would probably on the outside take ten minutes or something of that kind. If interested, he would respond with another phone call, and we would have a little exchange back and forth for probably less than five minutes. The time was so small, there—it would be difficult to estimate it.

Q. Now, whose names appear upon the property tax roll?

A. The property tax roll is carried Robert E. Austin and Marian H. Austin at the home address, 500 Poinsettia Avenue in Manhattan Beach. Now, there isn't anything other that carries that address. Each of the authorities in this case calls for your residence, and that's my residence, and while my business is all done at the business. We always use the home address.

Q. Your tax statements are received at your home address? A. Yes.

(Testimony of Robert E. Austin.)

Q. Is there any other place where your name appears, either your name, or your wife's name, appears as owners of [42] this property we have been talking about?

A. No other place. Just on the assessment rolls and on the deeds of the records in the county here is all.

Q. Did you usually meet the purchasers of these properties you sold to?

A. I very seldom do. I don't recall any deal where anybody ever came to my office or I ever went to anybody else's office in connection with the deals.

Q. Do you ever recall advertising in any newspaper any of this property for sale?

A. No, I never did.

Q. Did you ever advertise in any other way, any other medium?

A. No, I never did advertise any of this for sale.

Q. Did you ever have signs posted on lots, for sale signs? A. No.

Q. Or any other kind of signs?

A. No, I never posted any for sale signs, or in any other way ever advertised the fact that I owned the property or had a control of it.

Q. Have you ever signed any listing agreements in advance, any written listing agreements with real estate brokers?

A. I don't think I ever did. I don't want to be positive about that because sometimes some fellow may have a deal he [43] expected to make and may

(Testimony of Robert E. Austin.)

have presented it to me, some kind of a listing, but I don't remember anything of that kind. I feel sure that I never made one, but I don't want to make that absolutely ironclad.

Q. Have you ever had a real estate broker's license, or real estate salesman's license?

A. No, never had.

Q. Has your wife ever had a license of any kind? A. No, nothing at all.

Q. Did you ever subdivide any of this property?

A. No, I never subdivided any of these lots. These lots that we have been talking about are scattered lots and they were sold in the same condition that I bought them.

Q. Ever improve any of the lots and sell them as improved?

A. Well, nothing that's involved here. Yes, I have improved some lots. I built a building and rented it for many years. Have built two or three buildings that I have had on hand, and some of them I have now, a couple of them, I have sold, but not until after I had rented them for a considerable period.

Q. You built on those for your own income and investment?

A. Yes, just an investment proposition.

Q. A large number of these lots that have been mentioned today, you still own; is that right? [44]

A. Well, I wouldn't say a large number, no. We have been talking about many 150, or 160 lots; I probably own 15 or 20. My home, for instance, is

(Testimony of Robert E. Austin.)

on a lot comprising seven lots. I have one building that's on another lot comprising four lots; on another lot I have a building comprising three lots. I have got another project there that is about 15 lots in one place, but that isn't anything like enough to say that most of these are still on hand; some of them are.

Q. Is any office of any type or kind maintained at your home?

A. None at all. In fact, I do not maintain an office there. I don't even have my name in the telephone book. Not on account of real estate, but on account of people who need emergency legal service. I try to shut the door when I leave the office, and I don't solicit business at home.

Q. You don't have any cabinets or files or stationery or any other business paraphernalia?

A. No office equipment of any kind, no office or anything else.

Q. Does Mrs. Austin participate in any sales or purchase transactions other than the signing of the necessary documents?

A. Well, probably I ought to answer that no, because as a matter of fact I talk over with my wife, when a sale comes along, I probably tell her about it, but she doesn't have any [45] knowledge of the business in that respect.

The property there is scattered around, and I don't suppose that she knows where it's located.

Mr. Davis: Well, that's all, you may cross examine.

(Testimony of Robert E. Austin.)

Cross Examination

Q. (By Mr. Reardon): Mr. Austin, referring to this schedule in the stipulation, for the purpose of clarifying it for the record, isn't the total of the column labeled "Gross Income" that total is arrived at by adding the income from the rentals, other property income interest, the gross income?

A. Yes, I think the gross income—

Q. The gross income from your law business?

A. Yes, that's what I intended it to be, yes. That's the gross receipts from the law practice, gross receipts from rentals, gross receipts from interest included, and gross profits.

Q. Now, another column there is entitled "Fee Collections" in your law practice? A. Yes.

Q. That doesn't mean a number of individual single clients you had, does it?

A. The total of the column entitled "Gross Law Practice Fee Collections," that's the total amount of fees, cash fees, that I collected during the year. That is,— [46]

Q. In other words, several from one individual?

A. Yes. That's a number of different payments that came in to constitute that total.

Q. Now, as to all these lots, that we asked about today, you yourself bought all these? In other words, you didn't inherit any of them?

A. No, I didn't inherit any of them.

Q. How long have you lived in Manhattan Beach?

A. Oh, I began to live there in 1929. I was in

(Testimony of Robert E. Austin.)

and around Manhattan Beach, which was sort of a resort area, for 12 years prior to that.

Q. And you lived there consecutively since that time?

A. Yes, I have been there since 1929, always. I have either bought a house or a cabin around there for 12 or 13 years prior to that.

Q. Ever been active in civic affairs?

A. Not until 1932.

Q. It's fair to say you are well known in Manhattan Beach?

A. Well, when I moved there it was about 5000, and it's grown since then. I could probably say I am well known among the officials and business people of the area.

Q. Now, would you mind giving the Court a little of the background of Manhattan Beach? In other words, was this a desirable resort area years ago? [47]

A. Well, it was simply a strip of sand there that somebody thought would be a good place to sell some lots.

Along about 1904 they subdivided about four square miles of the beach and hill land back of the beach.

Q. Who was it that thought it would be a good idea to sell some lots, Robert H. Austin? I am guessing at that part.

A. You see that happened—

Q. And you think it was a good idea to sell lots—

(Testimony of Robert E. Austin.)

Mr. Davis: We object. No proper foundation, and immaterial, going back to 1904 and all that.

Q. (By Mr. Reardon): In 1945, did you think it was a good idea to buy lots in Manhattan Beach?

A. I bought under pressure. I wouldn't have bought them.

Q. Which lots are these?

A. Well, the lots that I bought from the City of Manhattan Beach, that 102 lots we were talking about this morning.

Q. You stated—did you use a broker in several of these transactions?

A. No, I don't think that was my statement. I said that brokers have frequently called me seeking lots for builders, and I made some transactions through a broker. Well, I sold to the brokers like I do anybody else. [48]

A man wants a price on a lot, and he will give him an answer.

Q. And these were brokers?

A. Some of them were brokers; some of them were not. There were some brokers that called me up and some builders who called me direct.

Q. Did it involve paying the broker any commission, either by the purchaser, or eventually the buyer of the lot?

A. Well, I would say, knowing the country, that any broker has got a commission, and I frequently adjusted the price so that the broker could take a commission out of it. That is, he says, "Well, how much do you want for these lots?" If I gave him

(Testimony of Robert E. Austin.)

a price, say of \$1500.00 well, he'd say—I would tell him I would give him \$100.00 on that, and he would say, "Let's make that \$1750.00 on that to take care of me," and deals were made like that sometimes.

Q. In other words, you paid brokers commissions?

A. The broker's commission was taken out of the price the buyer paid for the lot.

Q. When did your real estate activities begin in Manhattan Beach?

A. Why, in 1918, a woman came into the office and needed advice, and she gave me a lot on the beach for the fee.

Q. Now, when these sales were closed, where were they [49] closed?

A. Most of them were closed in an escrow office somewhere. Now, that would be the same as where they sold the builders a large group there, wherever there is a group of lots, that was closest to some escrow somewhere, and the others, like this fellow, who would want to buy, would be able to pay only part down. I would say, "Send me a check for whatever the amount agreed on was," and I sent him a contract there, and they agreed to pay it and—

Q. Who drew up these various papers?

A. I took care of it legal-wise; in connection with all these, I prepared the contracts that I made with people who sold and so on.

Q. Where, at your office?

(Testimony of Robert E. Austin.)

A. That's where I do my legal business, downtown.

Q. Downtown? A. Downtown.

Q. Now, these lots that you purchased from Manhattan Beach, had you seen any of these lots before you bought them?

A. I probably had seen them all, but I hadn't—

Q. In other words, you didn't?

A. I didn't—

Q. You didn't know you were buying lot such and such in an area?

A. I would not buy them sight unseen. [50]

Q. Did you see any of these before you sold them?

A. Oh, yes, I saw them all. I went out and saw every one I had. Somewhere along the line I went out to see what I had.

Q. In other words, it was only after you had acquired them that you were able to say, "This is my Lot 12, Redondo Villa Tract"?

A. Until I got the deeds, I didn't know what lots I had acquired.

Q. Now, none of these lots, excepting the ones on which you subsequently built, and which is income property, the ones we discussed earlier, none of these lots were productive of income?

A. No, they were all vacant when I bought them.

Q. What size were they?

A. There was a great variety of footage on them:

(Testimony of Robert E. Austin.)

some 50 feet wide and some were 40, and a few of them were 25 feet.

Q. Now, normally, in your experience in Manhattan Beach area, are they large enough to build a house on?

A. Well, I built my own house on six lots.

I have a neighbor who has a house built on one 30-foot lot, and another built on a 25-foot lot around the neighborhood. They know how to do it; it's a peculiar type of construction.

Q. Is this area a very desirable residential area at [51] this time?

A. Well, you could get quite an argument about that. Manhattan Beach was incorporated in 1904. Its streets are nearly all dirt streets now; the pavement has only reached a few of our main streets; the street I live on is unpaved.

Q. Since the war, would you say there has been a great amount of real estate development in that area?

A. Oh, yes, a very great amount in Manhattan Beach.

Q. Now, you said that none of these properties were productive of income. Were any of them acquired for the purpose of productive income?

A. Well, they were all acquired for the purpose of getting me off the hook, that guarantee I made the City of Manhattan Beach. Now, after I found myself with that, I began to cast about.

Q. Now, of this group that you acquired as a

(Testimony of Robert E. Austin.)

result of your civic duties to Manhattan Beach, isn't it true you made a profit?

A. Yes, I made a profit, I think, on every lot that I sold.

Q. Now, based upon your familiarity with Manhattan Beach, do you think it's fair to say—it's true to say that any owner of unimproved lots, such as yours, will receive many unsolicited inquiries?

A. Yes, at that time there was just a flood [52] of inquiries coming in.

Real estate brokers would go through the tax rolls—

Q. And you knew this? A. Yes.

Q. Now, over the years, the years in question and prior years, isn't it true that you made many loans from various different banks, real estate loans, I assume, for the purpose of financing—

Mr. Davis: Objected to as immaterial, irrelevant, and incompetent, and not related to the issues.

The Court: Overruled.

The Witness: Well, I borrowed a good deal of money from the banks, but just this minute it would be had to tell you what any particular loan was for.

I made some improvements and found myself short of money, and went to the bank and borrowed money to make up the shortage.

Q. (By Mr. Reardon): Now, several times you mentioned a real estate broker. The real estate broker called a neighbor, and so forth. Was this all the same person, or were these different—

(Testimony of Robert E. Austin.)

A. Well, Mr. Vonfeldt, he was a neighbor, and I think that he was concerned about three matters, one I mentioned to you.

Q. Were these other brokers—had you known them before [53] on these specific transactions?

A. Well, some of them I may have, but a lot of them I didn't. A lot of brokers that I did business with in this matter, people at whose first acquaintance with me was a phone call.

Q. How many of these lots were in this Manhattan Beach area?

A. All of them—except the 125 acres that I bought was in the Manhattan Beach area, but all the other lots—some of them were in Redondo Beach, so we regard that as being one area there; they are so close together.

Q. Now, my question is: You acquired each and every one of these lots with the expectation of making a profit?

A. With the hope of making a profit.

Q. Now, as to the number of lots that you have left out of these transactions, what was the approximate figure, do you recall?

A. Well, I have three lots left out of that 21 that I bought from the Amaranth Land Company, and I had 75 acres, 25, I bought from the Los Angeles Land Company up to six or eight months ago, and I have—well, perhaps I just better tell you how many I have. That will be the easy way. I have about 30 lots altogether.

Q. Left? A. Yes. [54]

(Testimony of Robert E. Austin.)

Q. And seven of them are your home?

A. Yes.

Q. And possibly four are property on which you built income producing?

A. Well, four lots at one place a lease site for one building.

Q. Yes.

A. And that leaves approximately 18 or 19.

Q. Beg your pardon?

A. I say that leaves us with 18 or 19.

I would like to go ahead a little farther with some improvements.

Q. All right.

A. On another perhaps five lots, I built an automobile sales agency that occupies five of them.

I have got three lots on Redondo Beach Boulevard that have some improvements on them.

Buildings on one of the lots and two others are adjacent for the parking site.

Then, I have ten lots that are on Sepulveda Boulevard in Manhattan Beach on which I am expecting to make some improvements in the near future, whenever it's justified.

Q. In other words, you have no unimproved lots left that you were holding for resale?

A. No, I have got several unimproved lots. [54a] I suppose I will hold them for resale unless I happen to have an opportunity to improve them, but as yet, it's yet to be determined.

Q. How many?

A. Well, I have got about—there must be nine

(Testimony of Robert E. Austin.)

or ten anyway, and of course, I'd sell them if I had an opportunity to sell them, just the same as I would sell my home or income property I am collecting some rent on and living on.

Q. Now, on direct examination, you said that you felt that these were good investments?

A. Yes.

Q. What made you think so?

A. Well, people have been coming in increasing numbers for quite a while, and that's been creating quite a demand for real estate. I think vacant real estate would likely increase in price.

Q. Now, relative to the lots you acquired through or as a result of your relationship with Mrs. Hartranft, it wasn't clear to me whether you felt you were legally bound to take these lots?

A. No, I wasn't. I didn't think I was legally bound, but I would have been terribly embarrassed—

Q. Had you seen those lots before?

A. No, I bought them before I ever saw them.

Q. Now, as to the lots relating to the fellow who came to you who had a bad heart ailment?

A. Yes.

Q. There were two lots involved there?

A. Yes.

Q. Did you make a profit on those two lots?

A. Yes, I made a profit on those.

Q. And how were they sold, separately?

A. Well, one of them I lost by foreclosure un-

(Testimony of Robert E. Austin.)

der some tax liens and street bonds, so I didn't sell that one, but it turned out that the building boom down there—

Q. In other words, you required to—

A. Yes, I didn't sell them together. I didn't sell one of them. One of them I didn't sell was all.

Q. Relative to the lots that were discussed in relation to Marie Hoskings, who you regarded as your adopted daughter, were there two lots involved there? A. Yes, there were two lots there.

Q. Were they sold separately?

A. They were sold separately, yes.

Q. Now, in and during your civic affairs and duties in Manhattan Beach, as regards these lots, did you do any word of mouth advertising?

A. No, I don't think I ever did.

In that connection, I might say that some of [56] my—well, a good many of my friends knew that I had some lots around there and I may have discussed that with some of them, but I don't recall, except for the first half dozen lots or so that I sold in 1945, I don't recall that I sold to any others that were friendly—close to me in any way.

Q. Now, directing your attention to the taxable year 1953, do you recall what profit, if any, you made off of these similar real estate transactions?

A. Well, I'd have to take a look at this chart we have here to do that.

Q. You say the figure of \$9000.00 was—

A. Well, I don't have those figures before me, and I don't know what 1953 may have been.

(Testimony of Robert E. Austin.)

Q. I show this to you and ask you if you recognize the signature.

A. Yes, that's—that seems to be my signature and my wife's signature on our 1953 return.

Q. Further directing your attention to Schedule D, approximately what profit from real estate transactions does that schedule show?

A. This schedule shows \$4,628.12 for the taxable amount of income from—

Q. And that is half of the profit?

A. Yes, I think so, yes. It doesn't say so, but I presume that's right. [57]

Q. Further, approximately how many real estate sales does this schedule show?

A. Why, that shows three sales in—it shows four sales in 1953, installment income.

Q. Four sales?

A. Yes, there were some sales made in prior years that on which collections were made in 1953.

Q. Now, directing your attention to this form which purports to be your income tax return for the year 1954, what is the amount shown as a profit from real estate sales?

A. Well, this shows—

Q. Remembering that the figure reported there is half of the profit.

A. Now, this shows \$6113.78, and which the \$2,224.00 is a share of a joint venture project on which I joined some other people.

Q. That's a real estate transaction?

(Testimony of Robert E. Austin.)

A. Yes.

Q. In other words, in the year 1954, you reported over \$16,000.00 profit from real estate transactions? A. That's right.

Q. Approximately how many transactions are involved there for the year 1954?

A. Five or six—let's see—there's only one sale in 1954, and the profit I got from the joint venture matter [58] there.

Q. Well, one actual sale, but these are incomes—

A. Well, this income is from sales that had been made in years gone by that appear on other lists. That is, one sale, as you are presenting now, might very well appear in ten different schedules.

Q. Now, for the same year, what was your approximate net profit from your legal profession?

A. Well, the net profit from my legal profession, according to this, was \$2825.00; the gross receipts for that, \$7,567.00.

Q. Now, directing your attention to the following year, 1955, using this to refresh your memory, what was it approximately, your net profit off your real estate transactions for 1955?

A. This shows that the 1955 return recorded \$9,911.00 taxable income from sales, and there were four sales made—five sales made in 1955.

Q. In other words, your profit on real estate transactions for 1955 approximates \$19,000.00?

A. Yes, that would seem to be so, from the figures you showed me.

(Testimony of Robert E. Austin.)

Q. And your approximate net profit from your legal profession?

A. Well, that profit for 1955 appears to be [59] \$4,544.00, and the total fees collected were \$9,900.00.

Mr. Reardon: The respondent rests, your Honor.

Redirect Examination

Q. (By Mr. Davis): This income that you have just related for the years 1953, 1954, and 1955 relate to not only sales but prior sales during—sales during prior years?

A. That's right. Some of the sales were during prior years, but some sales were for this year or for that year. You see, when a city grows from a population of 5000 to 35,000, it—real estate prices—many of these were made on the installment basis.

Q. Many of these were made on the installment basis?

A. Some of them were made on installment, yes, sir.

Q. Now, when escrow companies handled your transactions, did they draw up the papers?

A. Usually, they did.

Q. Has there been a sewer problem in the area of Manhattan Beach during the years in question that has affected values in the property?

A. Well, they are building a lot of sewers in Manhattan Beach during the last five or six years.

Q. I mean sewers into the ocean.

A. Well, that has some effect on it and in two or three ways. [60]

(Testimony of Robert E. Austin.)

Q. In spite of that, there's been quite an increase in population?

A. During part of the time that has been discussed here.

Q. Has swimming been prohibited on account of the polluted beaches?

A. Yes, there's been — the Health Department has quarantined the beaches on account of the Los Angeles sewage in that area. There's quite a little bit of controversy going on over that now.

Q. Were you aware of this at the time you entered into these transactions?

A. Well, when I first started, I wasn't aware of it. As a matter of fact, I didn't become aware of the fact that the beaches were quarantined until quite a while after this matter had been going on. I think probably 1950 is when the quarantine first went into effect there. Some of these transactions we have been talking about occurred in 1945, 1946, 1948 and 1949.

Q. Now, in addition to this property acquired in the Manhattan Beach area, and the two parcels in the City of Los Angeles, there is also certain property, at least one transaction involving San Bernardino County and Riverside?

A. Yes, but that was a total loss; I never did get anything out of that property.

I took that in for fees, and let the Tax Collector [61] take it over later on.

Mr. Davis: Well, that's all.

Mr. Reardon: Respondent rests, your Honor.

Mr. Davis: We rest.

The Court: Petitioner's brief will be due in 45 days; Respondent's 30 days thereafter, and the Petitioner may reply in 20 days?

Mr. Davis: Very well.

(Whereupon, at 3:00 o'clock, p.m., Monday, April 22, 1957, the hearing in the above-entitled matter was closed.) [62]

[Endorsed]: Filed May 10, 1957.

[Endorsed]: No. 16097. United States Court of Appeals for the Ninth Circuit. Robert E. Austin and Marian H. Austin, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: July 15, 1958.

Docketed: July 18, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16097

ROBERT E. AUSTIN and MARIAN H.
AUSTIN, Petitioners on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

**STATEMENT OF POINTS ON WHICH
APPELLANTS RELY**

To the Clerk of the United States Court of Appeals,
Ninth Circuit:

The Petitioners on Review in the above entitled matter rely upon the proposition that the testimony and evidence in the above entitled case do not support the finding of the Court below to the effect that "The lots sold by petitioners were held by them primarily for sale to customers in the ordinary course of trade or business."

Dated: July 21st, 1958.

/s/ ROBERT E. AUSTIN,
/s/ WENDELL H. DAVIS,
Attorneys for Petitioners on
Review.

[Endorsed]: Filed July 22, 1958. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD WHICH IS
MATERIAL TO BE CONSIDERED ON
APPEAL

The Petitioners on Review designate the:
Petition,
Answer,
Stipulation of Facts,
Reporter's Transcript as corrected by order of
Court,
Memorandum Findings of Fact and Opinion,
Decision, and
Petition for Review

as being all of the record which is material to the
consideration of the appeal herein.

Dated: July 21st, 1958.

/s/ ROBERT E. AUSTIN,
/s/ WENDELL H. DAVIS,
Attorneys for Petitioners on
Review.

[Endorsed]: Filed July 22, 1958. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

**STIPULATION FOR CONSIDERATION OF
EXHIBITS WITHOUT REPRODUCTION**

It is stipulated between counsel for the respective parties that the exhibits heretofore transmitted to the Court in their original form by the Clerk of the Tax Court of the United States may be considered by the above entitled Court in their original form without reproduction.

Dated this 29th day of July, 1958.

/s/ ROBERT E. AUSTIN,

/s/ WENDELL H. DAVIS,

Attorneys for Petitioners on
Review.

/s/ CHARLES K. RICE,

Assistant Attorney General, Attorney for Respond-
ent on Review.

[Endorsed]: Filed July 30, 1958. Paul P.
O'Brien, Clerk.

